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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

GENERAL MOTORS CORPORATION et al., Plaintiffs and Appellants, v. FRANCHISE TAX BOARD, Defendant and Respondent.	B165665 (Los Angeles County Super. Ct. No. BC269404)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mary Ann Murphy, Judge. Remanded.

Ajalat, Polley & Ayoob, Charles R. Ajalat, Christopher J. Matarese for Plaintiffs and Appellants.

Bill Lockyer, Attorney General, W. Dean Freeman, Lead Supervising Deputy Attorney General, Stephen Lew, Deputy Attorney General, for Defendant and Appellant.

This is a franchise tax refund case involving General Motors Corporation and its affiliated corporations (collectively, GM). The case is before us pursuant to a remand from the Supreme Court in *General Motors Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 773 (hereinafter, *General Motors*), which affirmed in part and reversed in part the judgment of this court and "remand[ed] the case for further proceedings consistent with the discussion herein and in *Microsoft Corporation [v. Franchise Tax Bd.* (2006)] 39 Cal.4th 750 [hereinafter, *Microsoft*]" (*General Motors*, at p. 793), which was the companion case to the case herein.

The Supreme Court in the present case held, inter alia, that short-term marketable securities known as repurchase agreements (repos) are properly characterized as secured loans when they are received in exchange for the use of money (rather than in exchange for a commodity), and that only the interest received and not the full price is a gross receipt for the purposes of taxing a multistate company's corporate income. (*General Motors*, *supra*, 39 Cal.4th at pp. 777-778, 787-788.) The amount of gross receipts is critical, since a company's business income is allocated among various states according to a formula, with a key factor being the "sales factor," which measures the portion of income attributable to a given state by dividing in-state gross receipts by all worldwide gross receipts. (Rev. & Tax. Code, §§ 25120, subd. (e), 25134.)[1]

Thus, the Supreme Court prohibited GM from including in the sales factor the entire proceeds involved in repo transactions, which the Franchise Tax Board (hereinafter, the Board) estimates as the bulk of the approximately $900 billion of returns of principal from investments made in the course of GM's ancillary cash management function. This ruling by the Supreme Court upheld the determination of the Court of

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1 Unless otherwise indicated, all statutory references are to the Revenue and Taxation Code.

California has adopted the Uniform Division of Income for Tax Purposes Act (UDITPA) (see Rev. & Tax. Code, § 25120 et seq.), which it uses to determine what portion of a multistate company's corporate income it may tax.

Appeal that precluded GM from using a significantly larger denominator in the sales factor as to repo transactions, prevented GM from diluting its California sales apportionment factor, and thus thwarted GM's effort to reduce its overall California tax liability.

However, the Supreme Court found that the Court of Appeal erred to the extent we also excluded from GM's gross receipts the full price of marketable securities held until maturity. The entire redemption price of these securities, known as redemption receipts, should have been included in GM's receipts when determining the sales factor. (*General Motors, supra,* 39 Cal.4th at p. 781.)[2]

Nonetheless, the bottom line as to tax liability is not reached until any adjustment is made pursuant to a statutory relief provision (§ 25137), which is the subject of the present remand. As the Supreme Court explained: "As we discussed in depth in *Microsoft Corporation, supra*, 39 Cal.4th at pages 764-770, the UDITPA contains a relief provision, section 25137, pursuant to which either the taxpayer or the Board may argue (1) the standard formula fails to fairly represent the extent of the taxpayer's California business activity, and (2) the taxpayer's or Board's proposed alternative method of calculation is reasonable. Here, in the parties' stipulation prior to entry of judgment, the Board expressly reserved the right to argue that any gross securities proceeds included in the sales factor produced distortion and should be excluded under section 25137. Neither the trial court nor the Court of Appeal had occasion to address application of this relief provision. Because the full proceeds from General Motors' redemptions should have been treated as gross receipts, we remand for further proceedings to allow the Board to

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2 Redemption receipts constituted approximately 6 percent of the gross receipts factor. Direct sales of securities to third parties (not an issue before the Supreme Court) constituted approximately 4 percent of the gross receipts factor, and repos constituted approximately 90 percent of GM's total gross receipts at issue. (See *General Motors, supra,* 39 Cal.4th at p. 779.)

make its section 25137 case in accordance with the principles set out in *Microsoft Corporation.*" (*General Motors, supra*, 39 Cal.4th at p. 789.)

As noted by the Board, in the present case the Supreme Court ordered a remand notwithstanding GM's protestations that because the Board had extensively briefed the section 25137 issue solely as a legal matter no remand was purportedly necessary. In the companion *Microsoft* case, the Supreme Court did not remand for further proceedings. In *Microsoft*, the Supreme Court held that the returned principal from Microsoft's investments constituted "gross receipts" for sales factor purposes, and it affirmed the Court of Appeal's decision that that Board was justified in using its authority under section 25137 to apply an alternative apportionment factor that excluded returns of principal from the taxpayer's sales factor. (*Microsoft, supra,* 39 Cal.4th at pp. 758-772.) In *Microsoft*, there was a full trial on the section 25137 issue. (*Microsoft*, at pp. 757-758.)

Here, however, there was no trial on any issue. Rather, after GM's motion for summary adjudication, the parties agreed to a stipulation to permit a prompt appeal. GM's motion for summary adjudication sought, in pertinent part, a finding "that as a matter of law 'all gross receipts', including gross receipts from securities, are part of the sales factor and there is no discretion to modify the statutory formula in this case." The Board opposed summary adjudication, both procedurally and substantively.

The Board argued that there were still disputed factual issues, and that discovery had just begun. The Board also disputed GM's definition of "gross receipts," and it urged that if returns of principal from GM's investments constituted gross receipts that the Board should be permitted to invoke section 25137 to apply an alternative apportionment formula that more fairly reflects GM's activities in California. The trial court ruled against GM on the gross receipts issue, and thus apparently had no reason to consider the section 25137 issue. (See *General Motors*, *supra*, 39 Cal.4th at p. 780.)

After summary adjudication, the parties stipulated, in pertinent part, that the trial court's oral ruling on summary adjudication would constitute its statement of decision, with judgment to be entered accordingly without prejudice to the parties' appeal rights.

The stipulation specified that the Board "shall not be precluded from contending, in any further proceedings in this case, that Revenue and Taxation Code section 25137 is applicable" if any of the returns of principal excluded from the sales factor denominator by the trial court were determined to constitute "gross receipts" for sales factor purposes. The stipulation further provided that the Board shall not be precluded from contending that section 25137 "applies to any and all of the amounts . . . that might be included [as gross receipts for sales factor purposes]." The stipulation did not specifically preclude further trial proceedings, including discovery and trial, in the event of a remand.

Now, upon remand from the Supreme Court, GM seeks to have this court resolve the section 25137 issue, a matter never addressed by the trial court. GM's primary contentions are that a very large distortion in the overall apportionment percentage is necessary to justify application of section 25137, and that the Board has failed to establish by clear and convincing evidence that the standard statutory apportionment formula does not fairly reflect GM's business activity in the state. The Board's position is that we should remand the matter to the trial court for proceedings consistent with the *General Motors* and *Microsoft* cases, and that the Board is entitled to submit evidence and testimony to support its position and to challenge what GM claims are undisputed facts.

We agree with the Board. The Board's approach is most consistent with the Supreme Court's requirement of a "remand for further proceedings to allow the Board to make its section 25137 case." (*General Motors, supra,* 39 Cal.4th at p. 789.) We note that to the extent either party questions our interpretation of the nature and scope of the remand proceedings or the trial court's implementation of the remand, it may seek from the Supreme Court a writ of mandate to compel compliance with its interpretation of the remand directions (see *Bakkebo v. Municipal Court* (1981) 124 Cal.App.3d 229, 234), or

a writ of prohibition to restrain variance from its interpretation of the remand directions (see *Hampton v. Superior Court* (1952) 38 Cal.2d 652, 656).[3]

DISPOSITION

The matter is remanded to the trial court to allow the Board to make its section 25137 case, and for the trial court to resolve the matter consistent with the discussion in the *General Motors* and *Microsoft* cases.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.

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[3] It is apparent, however, that the Board's stated intention to "also ask the trial court to determine whether GM's certificates of deposits constitute loans or sales for sale factor purposes" is beyond the scope of the section 25137 remand. Just because the Supreme Court apparently declined to address the matter does not permit the Board to expand the scope of the remand to include that issue.